STATE OF MICHIGAN
IN THE SUPREME COURT

MARCIA VAN TIL,

Plaintiff-Appellant,

v.

Supreme Court No. 128283
Court of Appeals No. 250539
Lower Court No. 02-42717-NO

ENVIRONMENTAL RESOURCES MANAGEMENT, INC., a Pennsylvania Corporation doing business in Michigan,

Defendant-Appellee
_____/

Thomas J. Wuori (P41096)
Richard L. Halpert (P22772)
HALPERT, WESTON, WUORI & SAWUSCH, P.C.
Attorneys for Plaintiff-Appellant
136 E. Michigan Avenue
Old Kent Building, Suite 1050
Kalamazoo, Michigan 49007
(269) 388-4800

John N. Cooper, II (P27678)
Margot M. Poznanski (P47786)
COOPER, MARTIN & CHOJNOWSKI, P.C.
Attorneys for Defendant-Appellee
259 E. Michigan Ave., Suite 208
Kalamazoo, MI 49007
(269) 552-3400
_____/

DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF SUBMITTED IN ACCORDANCE WITH THE COURT'S ORDER DATED MAY 12, 2006

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A. DO THE FACTORS OUTLINED IN *ROBINSON V. CITY OF DETROIT* SUPPORT OVERRULING *SEWELL V. MACHINE CLEARING HOUSE?*

DEFENDANT APPELLEE ANSWERS "NO"

THE TRIAL COURT DID NOT ADDRESS THIS QUESTION

THE COURT OF APPEALS DID NOT ADDRESS THIS QUESTION

III. ARGUMENT

On May 12, 2006, the Court issued an Order which directed the parties, and invited *amici curiae*, to file supplemental briefs discussing the following topics: "[Supplemental briefs shall address] the likely practical consequences that would result if this Court were to overrule *Sewell v. Clearing Machine Corp.*, 419 Mich 56 (1984). The supplemental briefs shall also discuss the factors that a court is to consider before overruling a prior decision, as set forth in *Robinson v. City of Detroit,* 462 Mich 439, 464 (2000). In particular, the briefs shall discuss (1) the effect of overruling *Sewell, supra,* on reliance interests and whether overruling would work an undue hardship because of that reliance, and (2) whether overruling *Sewell, supra,* would produce not just readjustments, but practical real-world dislocations. *Robinson, supra* at 466."

This Supplemental Brief is filed in accordance with the Court's Order and addresses the required topics. It dispenses with any prefatory briefing requirements that would duplicate ERM's previous submissions, such as a statement of jurisdiction, statement of facts, and the like.

A. The *Robinson* Factors Militate Strongly Against Overruling *Sewell*

This Court's Order requires the parties to discuss, *inter alia,* " the factors that a court is to consider before overruling a prior decision, as set forth in *Robinson v. City of Detroit,* 462 Mich 439, 464 (2000)." The first of these factors, which must be dispositive if answered in the negative, is whether the decision the Court is revisiting was wrongly decided: "The first question, of course, should be whether the earlier decision was wrongly decided." *Id.* As the *Robinson* opinion observed, stare decisis does not constrain the Court to follow precedent that is "unworkable or badly reasoned." *Id.* at 464. The corollary of this observation is that the Court *is* constrained by stare decisis principles to follow precedent if it is *not* unworkable or badly reasoned. The correctness of the decision, however, is by no means the only consideration, and even if the earlier case was

wrongly decided, the inquiry must continue. "[T]he mere fact that an earlier decision was wrongly decided does not mean overruling it is invariably appropriate." *Id.* at 465. "Rather, the Court must proceed on to examine the effects of overruling . . .." *Id.* at 466.

The second factor to consider, tying into the corollary discussed above, is whether the earlier precedent "defies 'practical workability.'" *Id* at 464.

The third factor to consider is whether the earlier precedent's "reasoning or understanding of the Constitution is fairly called into question." *Id.* at 464.

The fourth factor to consider is "whether reliance interests would work an undue hardship." *Id.* This is the most important of the additional factors beyond correctness of the decision, both as stated by the *Robinson* Court and by this Court's current briefing instructions to the parties: "[T]he Court must proceed on to examine the effects of overruling, including most importantly the effects on reliance interests and whether overruling would work an undue hardship because of that reliance." *Robinson,* at 466. "In particular, the briefs shall discuss (1) the effect of overruling *Sewell, supra,* on reliance interests and whether overruling would work an undue hardship because of that reliance." Order requiring supplemental briefing.

The fifth factor to consider is "whether changes in the law or facts no longer justify the questioned decision." *Id.*

When fairly considered, every single one of these factors militates against overruling *Sewell.* When considered in concert, the impropriety of overruling *Sewell* becomes overwhelmingly clear.

1. *Sewell* Was Not Wrongly Decided

Sewell v. Clearing Machine Corp., 419 Mich 56 (1984) was not wrongly decided. The decision properly found, in accordance with the Michigan Constitution's grant of plenary power to the circuit courts in art. 6, § 13, and further in accord with the weight of precedent, that a circuit

court has subject matter jurisdiction to determine whether a case falls within its own jurisdiction, even if that involves consideration of facts relating to jurisdiction. It explained the decision by adopting the reasoning of a previous opinion distinguishing *Szydlowski* which the *amici* say should be controlling:

> [*Szydlowski*[1] was a claim] involving the grant of workmen's compensation benefits under circumstances which would have completely usurped the function of the Workmen's Compensation Bureau had the Court allowed the circuit court concurrent jurisdiction. Plaintiff based her entire suit on the mandatory WDCA warranty insuring 'reasonable medical, surgical and hospital services.' Given the way she framed her action, the trial court could not have given judgment without directly passing upon a recovery provision of the act. Certainly, such action would serve to replace the exclusive function the act reserved to the Workmen's Compensation Bureau.
>
> In the case before us now, plaintiff does not seek to substitute the trial court for the bureau. The action alone seeks determination of the trial court's rightful jurisdiction – that is, whether plaintiff's action violates the statutory jurisdiction of the WDCA. **This question the court must answer. The court must have jurisdiction to decide the matter of its own jurisdiction. Its resolution of jurisdictional facts is appropriate to the singular purpose of resolving the jurisdictional problem.**
>
> Further, *Szydlowski* involved the question whether injuries arose out of and during the course of employment and whether those injuries were compensable under a provision of the act. No determination of employee or employer status and its implications arose for the court to consider there.
>
> In short, we find the particular question addressed by the trial court properly raised and resolved there. **The court must and the act intends to allow circuit court determination of legal questions involving legitimate matters of jurisdiction touching its own court.** If the suit conflicts with the ability of the Workmen's Compensation Bureau to award compensation, then the circuit court must deny the parties' attempt to litigate there. **However, the circumstances presented by this case and others involving statutory defenses under the act must be resolved by the trial court as to the jurisdictional implications under the act.** [*Sewell, supra,* 419 Mich at 63-64, *quoting with approval Nichol v. Billot,* 80 Mich App 263, 272, fn.1 263 NW2d 345 (1977) (Brennan, J., dissenting), *reversed by Nichol v. Billot.,* 406 Mich 284, 279 NW2d 761 (1979) (Emphasis added.)]

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[1] *Szydlowski v. General Motors Corp.,* 397 Mich 356, 245 NW2d 26 (1976)

Thus, the *Sewell* court fully explained its reasoning and distinguished *Szydlowski* on a principled basis. Further, as this Court observed and discussed at length in *Fox v. Martin,* 287 Mich 147, 151, 283 NW2d 9 (1938): "**Jurisdiction does not depend on the facts, but the allegations.**" (Emphasis added.) Since there is no allegation in Plaintiff-Appellant's Complaint regarding any worker's compensation claim, there is no question but that the circuit court has jurisdiction over the case, even after a defense is raised that *may* take the matter out of the circuit court's jurisdiction. The circuit court then has jurisdiction to resolve the jurisdictional facts. *Nichol v. Billot, supra, Haywood v. Johnson,* 41 Mich 598, 2 NW 926 (1879). Up to the moment the circuit court determines that it does not have subject matter jurisdiction, that jurisdiction exists. After that point, the circuit court may act only to dismiss the case. "**When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void.**" *Fox v. Board of Regents of University of Mich.* 375 Mich 238, 242, 134 NW2d 146, (1965) *See also Bowie v. Arder,* 441 Mich 23, 56, 490 NW2d 568 (1992).

Since *Sewell* was correctly decided, the first *Robinson* factor, which is dispositive of the issue when the earlier decision is correct, alone requires that *Sewell* not be overruled.

2. **<u>*Sewell* Does not "Defy Practical Workability" Nor Is It Badly Reasoned.</u>**

a. **<u>*Sewell* is well reasoned</u>**

First, as discussed above, not only was *Sewell* not "badly reasoned," it was correct. Though the decision may have arrived at the Court in an odd procedural posture, it appears that the Court may have given considerable thought to the issue. This is suggested by the fact that the Court held the *Sewell* case in abeyance for two years (from 1980 to 1982) pending a decision in another case, *Farrell v. Dearborn Mfg. Co.,* 416 Mich 267, 330 NW2d 397 (1982), and then, in addition, still held it for another two years after *Farrell* was issued. *Sewell,* 419 Mich at 59, n. 2. Furthermore, the

decision comported with longstanding precedent. The principle that a court has jurisdiction to decide its own jurisdiction is of such ancient origin that once the Court understood that this was at issue, the decision was clear. Nor did the *Sewell* Court overrule *Szydlowski* (as some *amici* have suggested) but, rather, distinguished it on a principled basis, stating only that, as happens from time to time, the language of the opinion painted with too broad a brush. As properly limited to the facts that were at issue, *Szydlowski* remains the law, applicable when the circumstances are similar.

b. The courts embraced the *Sewell* decision without comment

In *Robinson,* the Court associated "practical workability" with the idea that lower courts were able to live with the decision without making comments asking that it be modified. Because the "Court of Appeals ha[d] repeatedly questioned" one of the decisions under review, the Court found that the decision's "practical workability" was "suspect." 462 Mich at 466. The lower courts had made comments about the decision being revisited as follows: "We invite the Supreme Court to establish a bright line test" and "I urge the Supreme Court to reconsider [the decision]" and "I concur but suggest this area of the jurisprudence of this state should be revisited by the Supreme Court." *Robinson*, 462 Mich at 450, n.9.

The *Sewell* decision is so far from being "unworkable" in this sense that it has been applied without any cavil or complaint by the trial courts, the Court of Appeals, and this Court ever since it was decided twenty-two years ago. Considering only the appellate decisions, the relevant conclusion in *Sewell* has been mentioned with approval and without surprise in twelve different decisions, including two from this Court, six published and three unpublished decisions of the Court of Appeals, and one decision from the Missouri Supreme Court.[2]

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[2] These cases are *Adams v. National Bank of Detroit,* 444 Mich 329, 370, 508 NW2d 464 (1993); *Boscaglia v. Michigan Bell Telephone Co.,* 420 Mich 308, 321, 362 NW2d 642 (1984); *Specht v. Citizens Ins. Co.,* 234 Mich App 292, 297, 593 NW2d 670 (1999); *Amerisure Ins. Cos. V. Time*

There has never been a suggestion in any of the cited appellate decisions, or in the small number of other decisions that cite *Sewell* only in passing, that there is a problem or a difficulty in understanding or applying *Sewell's* rule of decision. Rather, *Sewell* is simply applied or cited for the proposition that the trial court has jurisdiction to decide the question whether a person is an employee (or a fellow employee) under the statute given the facts at hand.

A listing of twelve cases might be rather limited, but it must also be considered that there are many more decisions (such as the present one) in which the trial court has applied *Sewell sub rosa* without any need for citation because there was no doubt in the minds of the litigants and the courts that the trial court had jurisdiction to make the decision. Thus, the *Sewell* decision simply cannot be considered to "defy practical workability" as would be required under *Robinson* to support a decision to overrule it.

c. No one complained about *Sewell* before 2005

The sole glaring exception to the consistent pattern of citation of *Sewell* with approval comes in Justice Corrigan's recent dissenting opinion in *Reed v. Yackell*, 473 Mich 520, 703 NW2d 1 (2005), and even that dissent does not suggest that *Sewell* "defies practical workability." It must be reiterated that, as is also true in the present case, the parties in *Reed v. Yackell* did not question whether the trial court had subject matter jurisdiction to make the decision whether the injured person was an employee of the defendant. No one questioned *Sewell* in the trial court or the Court of Appeals in either *Reed v. Yackell* or the present case. Instead, as had occurred numerous times

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Auto Transp., Inc., 196 Mich App 569, 572, 493 NW2d 482 (1992), *Integral Ins. Co. v. Maersk Container Service Co., Inc.* 206 Mich App 325, 330, 520 NW2d 656 (1994); *Westchester Fire Ins. Co. v. Safeco Ins. Co.*, 203 Mich App 663, 669, 513 NW2d 212 (1994); *Netherlands Ins. Co. v. Bringman*, 153 Mich App 234, 240, 395 NW2d 49 (1986), *Michigan Property & Cas. Guar. Ass'n v. Checker Cab Co.*, 138 Mich App 180, 183, 360 NW2d 168 (1984), *Associated Builders & Contractors of Michigan Self Insured Worker's Compensation Fund v. Acker Steel Erectors, Inc.*, (unpublished) 2005 WL 1458634 (June 21, 2005); *Safeco Ins. Co. v. Davis*, (unpublished) 2000 WL 33421417 (May 2, 2000), *Barnard v. Tryzos*, (unpublished) 1996 WL 33359122 (Sept. 13, 1996).

before, litigants and courts alike found *Sewell* so "practically workable" that the question of subject matter jurisdiction never even came up because it was settled.

Instead, the idea that *Sewell* was wrongly decided, raised for the first time in January 2005 after *Reed v. Yackell* reached this Court for the second time, was raised not by the parties but by an unchallenged *amicus* brief, the reasoning of which was adopted with attribution in Justice Corrigan's dissenting opinion in *Reed.* That same idea has been pursued vigorously in this case by that same *amicus curiae*, an organization which has a vested interest in the outcome, namely, the Worker's Compensation Law Section of the State Bar of Michigan ("WCL Section"). Other *amici* have now hopped on the bandwagon, but they expressly acknowledge that their arguments are derivative of the reasoning propounded by the WCL Section, rather than being indicative of a previously perceived problem with the "practical workability" of the *Sewell* holding.[3]

d. In practice, *Sewell* operates seamlessly

In practice, *Sewell*-style concurrent jurisdiction works beautifully. If a case is filed in the Worker's Compensation Agency ("WCA") by a claimant seeking benefits, and the employment issue arises, because of concurrent jurisdiction the WCA may make the assessment whether the claimant is an employee and, if the conclusion is in the affirmative, can then resolve other issues bearing on whether he or she is otherwise entitled to benefits under the Worker's Disability Compensation Act ("WDCA"). This was the posture of *Hoste v. Shanty Creek Mgt., Inc.,* 459

[3] *See, e.g.* p. 13 of the Brief of *amicus* the Director of the WCA: "The Director adopts and incorporates by reference the arguments presented by the Workers' Compensation Law Section of the State Bar of Michigan." It is also worth noting that none of the *amici* raised this topic for approximately twenty-one of the twenty-two years that *Sewell* has been the law of this state. Since the WCL Section was not constrained in *Reed* or these cases from raising the issue even though neither the courts nor the parties had ever considered it, one must assume that, had *Sewell* been as poor a decision as it is now argued to be, there would have been an upswelling of protest from the time it was decided, especially since there was one dissenting justice. Instead, the decision had been accepted and applied consistently until the "provocative" *amicus* brief was filed by the WCL Section in *Reed v. Yackell.* (So described in the majority opinion, 473 Mich at 538).

Mich 561, 592 NW2d 360 (1999). If the WCA concludes that there is no employment relationship, as it did in *Hoste,* and thus the claim does not "arise under" the WDCA, the exclusive remedy provision will not bar the claimant's tort action in a trial court.

On the other hand, if a case is filed in the trial court and a defendant claims the benefit of the exclusive remedy provision, the trial court, which is perfectly accustomed to applying statutes (even quite complicated statutes) to facts, can determine whether there is an employment relationship such that the case "arises under" the WDCA, and may take action based on the conclusion. This was the scenario of the present case. Though many issues would benefit from agency expertise, the question whether an entity is another's employer within the meaning of the statutory language is not one of them.

Finally, if a case is filed in the trial court and it is the trial court's assessment that the technical demands of the particular factual situation before it do require the expertise of the WCA, there is nothing preventing the trial court from holding the matter in abeyance while requiring the parties to have their issue resolved by the WCA, after which the court can take action based on the WCA's conclusion. All is perfectly orderly and fits in beautifully with the natural division of labor between courts and administrative agencies in areas of slightly overlapping jurisdiction.

e. Flexibility is lost if there is no concurrent jurisdiction

A slight digression is useful now to make a point related to the immediately preceding section. There is nothing in the nature of concurrent jurisdiction that *requires* a court to make a determination about which it lacks expertise. In fact, this flexibility is the beauty of the system as it is now constituted. However, it is vital for this Court to recognize that one of the most important "practical real world dislocations" which would occur if this Court were to overrule *Sewell* is that this flexibility would be entirely lost. Contrary to the suggestions of most of the *amici,* a matter

filed in the circuit court could not be "stayed" or "held in abeyance" pending a trip through the worker's compensation system, because, if a court lacks subject matter jurisdiction, that court may not issue a stay order or any other order aside from an order to dismiss.[4] Other than one of dismissal, any order by a circuit court without subject matter jurisdiction is "absolutely void." *Fox, supra, Bowie, supra.* The language of the *Bowie* opinion is particularly trenchant: "The jurisdiction of a court arises by law, not by the consent of the parties. Parties cannot give a court jurisdiction by stipulation where it otherwise would have no jurisdiction. When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void." 441 Mich at 56 (citations omitted).

Accordingly, since a court without jurisdiction cannot hold a matter in abeyance, the protestations from *amici* that the existence of this procedure would ameliorate the real-world effects of overruling *Sewell* are shown to be resting upon quicksand.

f. Summary and conclusion as to *Robinson* factor 2

We return to the main thread of the argument on the second *Robinson* factor. Requiring consideration of whether the earlier decision "defies practical workability" strongly suggests that even if a decision is wrong (and *Sewell* is not), this Court should not be about the business of overruling a decision that has worked well for twenty-two years when there is no suggestion from trial courts, the Court of Appeals, or even this Court that the decision has been problematical. This

[4] *See, e.g.* p. 18 of the *amicus* brief of the Director of the Workers' Compensation Agency in which the writer states that "holding a matter that has been filed in circuit court in abeyance, pending a decision by another tribunal, is not a new concept for circuit courts. . . . It can and should have occurred in the matters under consideration here and the Director would encourage, and respectfully asks, this Court to follow this procedure." This suggestion simply misperceives the nature of subject matter jurisdiction, for a court without subject matter jurisdiction over a matter cannot hold it in abeyance.

is especially true when all voices arguing for overruling can be traced back directly to the argument of a single *amicus curiae*, which has a strong economic interest in the outcome of the decision.

Thus, the second *Robinson* factor, considering whether the earlier decision "defies practical workability" or is "badly reasoned" strongly militates against overruling *Sewell.*

3. *Sewell* Does Not Misunderstand the Constitution and Is Not Badly Reasoned In Relation to Constitutional Matters. To the Contrary, Overruling *Sewell* For The Reasons Urged Would Misapply And Infringe Upon The Separation Of Powers

As this Court recently observed,

> As the Michigan Constitution makes clear, the duty of the judiciary is to exercise the "judicial power," art 6, § 1, and, in so doing, to respect the separation of powers, art 3, § 2. **While as a *general proposition* the proper exercise of the "judicial power" will obligate the judiciary to give faithful effect to the words of the Legislature** – for it is the latter that exercises the "legislative power," not the judiciary – **such effect cannot properly be given when to do so would contravene the constitution itself.** [*National Wildlife Federation v. Cleveland Cliffs Iron Co.*, 471 Mich 608, 637, 684 NW2d 800 (2004) (Italics in original, bold emphasis supplied]

Overruling *Sewell* by holding that the circuit court lacks subject matter jurisdiction of the instant case would contravene the Michigan Constitution, and would thus elevate the legislative power over the Constitution in violation of the state's constitutional separation of powers under Michigan Constitution art. 3, § 2. Here, art. 6, § 13 of the Michigan Constitution clearly states that the circuit courts have original jurisdiction in all matters unless "prohibited by law." For 132 years, the decisions of this Court have repeatedly and consistently held that, to be effective in divesting the circuit courts of jurisdiction, any such "prohibition" of jurisdiction must be stated in mandatory language that leaves nothing to the play of doubt or uncertainty. *Crane v. Reeder,* 28 Mich 527, 532-33 (1874). Furthermore, *Crane* makes clear that, even in 1874, this principle was settled law of ancient origin, citing old English cases for the proposition.

The previous decisions of this Court, reviewed at length in Defendant-Appellee's Brief on Appeal at pp. 8-13, demonstrate unequivocally that, absent express language stating that a grant of jurisdiction to another judicial or quasi-judicial body is exclusive, that grant of jurisdiction [in this case, MCL 418.841's grant to the WCA] accomplishes only a grant of jurisdiction which is concurrent with the plenary jurisdiction of the circuit courts. Any decision by this Court that the language of MCL 418.841 accomplishes a divestiture of circuit court's jurisdiction **without saying any direct word about so doing**, would be to give effect to the legislative power in such a way as directly to contravene the constitutional grant of jurisdiction to the circuit courts, in violation of the prohibition stated and discussed at great length in *Cleveland Cliffs Iron Co., supra.*

Cleveland Cliffs is properly interpreted as holding that it is inappropriate to canonize a few words of a statute in the interests of "textualism" when to do so, one must ignore the "text" of the Michigan Constitution.[5] One cannot properly have a textualist approach when giving effect to the Legislature's statutory language requires trampling on the constitution.

Overruling *Sewell* by holding that the circuit court has no power to assess jurisdictional facts would comprise the first decision ever rendered in this state holding that a circuit court lacks power to determine its own jurisdiction. In so doing, this Court would set a precedent that goes against hundreds of years of settled law, and would create a rule of decision that could be applicable far beyond the limited context now at issue. It would create a precedent elevating the power of an administrative agency far beyond that of the circuit courts. It would create the very first precedent

[5] The phrase "a few words of a statute" is used advisedly because Defendant-Appellee is entirely in agreement with the argument, stated by Amicus Curiae Michigan Defense Trial Counsel in briefs to this Court, that giving the argued-for effect to the second clause of the first sentence of MCL 418.841(1) renders the entire first clause of that sentence nugatory. Accordingly, reading the statute as urged would require ignoring the canon of statutory construction that a court must strive to give effect to every word, phrase and clause of a statute, without rendering any of them either surplusage or nugatory. *Reed, supra,* 473 Mich at 537.

suggesting that there is no need for a statute to employ powerfully precise and exact language to divest the circuit court of jurisdiction; that, instead, even inexact and questionable language will suffice to sever chunks of the jurisdiction of the circuit courts. The resultant shift in the balance of power, allowing the legislative branch to elevate the executive branch over the judiciary branch, not to mention the Constitution, would have unpredictable and potentially significant ramifications.

Since *Sewell* properly gives deference to the Constitution's grant of plenary jurisdiction to the circuit courts, it does not misunderstand nor misapply the Constitution. However, a contrary decision overruling *Sewell* would violate the Constitution's requirement of separation of powers and would disturb the equal balance and deference among the branches of government.

Accordingly, consideration of the third *Robinson* factor (whether the decision misperceives the Constitution) militates against reversal of *Sewell* as well, because the *Sewell* Court properly understood and applied the Michigan Constitution's grant of jurisdiction to the circuit courts.

4. Overruling *Sewell* Would Improperly (and Unnecessarily) Infringe Upon Reliance Interests and Would Work an Undue Hardship

In *Robinson,* the fourth factor, involving whether there is a reliance interest, endeavors to ascertain "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." 462 Mich at 466. It asks whether overruling the decision would work an undue hardship because it so adversely affects the reliance interests the decision has created. *Id.* at 464. It suggests viewing these factors from the perspective of those who might be affected by the change. *Id.* at 467.

a. *Sewell* is embedded, accepted, and fundamental

Defendant-Appellant submits that the *Sewell* decision has, indeed, become "embedded" in the jurisprudence of this state. As noted above, the decision has been adopted and applied by numerous appellate courts and one can only guess at the number of unreported lower court decisions which have understood and applied the decision exactly as it was explained by this Court in the opinion. Thus, its holding has come to be known and accepted as correct, and was basically never questioned before 2005. Additionally, because the existence of the circuit court's subject matter jurisdiction derives directly from the Michigan Constitution, and furthermore is so fundamental to the operation of the circuit court, it deserves special deference. Finally, because, unlike the decisions being revisited in *Robinson, Sewell* concerns the somewhat arcane idea of subject matter jurisdiction, the expectations of litigants and courts, rather than those of ordinary citizens (as was the case for the statutes at issue in *Robinson*), must be considered.

b. The readjustments of prior precedent attendant upon overruling *Sewell* are far-reaching

If this Court overrules *Sewell* and finds that the circuit court lacks subject matter jurisdiction to determine whether a case is properly in the worker's compensation system, not only the parties to the current litigation will be unfairly impacted, but many others will be significantly affected as well. Furthermore, the "readjustments" of prior precedent that overruling *Sewell* will cause have previously been alluded to, and would have far-reaching, but unpredictable, consequences. In summary form, there has never been a precedent holding that a circuit court lacks the power to determine its own jurisdiction. There has never been a precedent elevating the power of an administrative agency above the constitutional power of the circuit courts. There has never been a precedent allowing the complete divestiture of circuit court jurisdiction based on anything other than explicit words that cannot be understood in any other way.

c. Overruling *Sewell* would cause substantial "practical real-world dislocations."

The matters discussed in section B of the Argument describe substantial practical real-world dislocations that would result from the unnecessary overruling of *Sewell*. Further such practical effects are discussed below, and it is worthwhile at this juncture to observe that there is absolutely no need for taking such drastic measures and causing these dislocations.

d. Overruling *Sewell* is unnecessary because prudential concerns can be addressed without doing away with concurrent jurisdiction

The prudential concerns expressed by various *amici* and the dissent in *Reed v. Yackell*, including primarily loss of agency expertise or conflicting decisions or the same matter being decided in two places at once, can easily be addressed without throwing out the baby with the bathwater. First, as noted above, the employer issue is not particularly technical, so there is little concern about the need for agency expertise. Resolution of the issue in a particular case depends almost entirely upon analysis of common legal terms and the interpretation of them by this Court, an exercise that trial courts are eminently equipped to undertake.

Second, there is a middle ground, illustrated by this Court's decision in *Rinaldo's Construction Corp. v. Michigan Bell Telephone Co.*, 454 Mich 65, 559 NW2d 647 (1997). There, this Court acknowledged that the statute at issue granting power to the MPSC was not sufficiently definitive to divest the circuit courts of jurisdiction (therefore creating concurrent jurisdiction). Regardless, as a jurisprudential matter, this Court urged the wisdom of the circuit court stepping aside to permit the public service commission to address those questions as to which its expertise was helpful. In a similar fashion, without having to hold that there is no subject matter jurisdiction, there is nothing preventing this Court from extolling the virtues of a procedure whereby a circuit court presented with a technically difficult issue steps aside to allow the WCA to have a crack at it.

In other words, this Court can say that courts should step aside in such cases, without having to hold that courts must do so. Professions of such nature from this Court carry great weight, and based on them, parties would be able to abjure trial courts to observe the procedure in proper cases. Thus, the prudential concerns are addressed without there being a need to hold that there is an entire lack of subject matter jurisdiction. In fact, only when there is concurrent jurisdiction is such flexibility is possible, because the circuit court cannot step aside and re-enter unless it also has jurisdiction.

e. All decisions by circuit courts in cases that might fall into or out of the WDCA would be void *ab initio*

A ruling that a court lacked subject matter jurisdiction when it made a decision renders that earlier decision void, and not just prospectively. The decision is rendered void *ab initio*. This concept is best illustrated by the companion case to *Bowie v. Arder*, *Duong v. Hong*. In that case, this Court held that the circuit court had lacked subject matter jurisdiction when it made a decision *ten years previously* in the course of a child custody dispute, and that it should have dismissed the action then in favor of the probate court. This Court recognized that, since a decision made without jurisdiction is void, the ten-year-old decision had no force and effect, and not only that, all the Court's subsequent decisions based on that decision were also void. Furthermore, even though the child had been in the custody of one of the parties pursuant to the circuit court's decision for the entire ten-year period, the parties were required to return to square one and start their custody battle over in the probate court. 441 Mich at 56-58.

i. Litigants aggrieved by past decisions could revisit them, burdening the opposing parties' reliance interest in the settled outcome of the decisions

Because voiding is required when a decision was made without subject matter jurisdiction, any party who is aggrieved by an issue decided by a circuit court interpreting the WDCA during the last twenty-two years would have an argument that that decision is void and must be refiled in the

WCA. The practical effect of even a small fraction of these litigants deciding to revisit their perceived past wrongs would be substantial. Old matters would reopen unexpectedly when the litigants have fairly thought the matters closed forever, when memories have faded, and lives and livelihoods have already moved on. A clearer example of an infringement upon a reliance interest based on a past decision can not be imagined. The undue hardship is self-evident.

ii. The reliance interest of the current parties would be substantially burdened.

As for the current parties, *Sewell* was settled law. The existence of subject-matter jurisdiction in the trial court was clear and uncontradicted law four years ago, when the Plaintiff-Appellant filed her action. It was clear and uncontradicted law three years ago when the trial court granted summary disposition to Defendant-Appellee. It was clear and uncontradicted law two years ago when the Court of Appeals affirmed the trial court's grant of summary disposition to the Defendant-Appellee. And finally, it was clear and uncontradicted law both when the Plaintiff-Appellant filed her application for leave to appeal in this Court and when Defendant-Appellee filed its opposition thereto. The parties therefore have a reliance interest in *Sewell's* correctness because they have litigated in good faith and have expended substantial effort based on its continued vitality.

It was not until a few months after the application for leave was filed that there was any suggestion that there was an issue about the existence of subject matter jurisdiction, and even then, the matter was raised in a dissent, and seemed to have little to do with the parties' case, in which no one had ever raised the issue. Then this Court granted the application for leave to appeal, changing the entire course of this litigation, and now, various *amici* who have no relation to the parties and will not be directly affected by the decision, are insisting that the decision of the trial court, rendered over three years ago, be voided and the entire matter be sent back to be entirely re-litigated as to the employer issue in the WCA. These *amici* are so urging despite the fact that any appeal from the

decisions of the WCA and the WCAC would be to the Court of Appeals, which has already ruled in clear and convincing fashion in favor of Defendant-Appellant. The extensive investment in litigation expenses by these parties regarding the employer issue constitutes a reliance interest in the continued vitality of the *Sewell* decision, and it would be a hardship, and most certainly an undue one, if it were to be overruled.

iii. **The reliance interests of litigants in other pending matters would likewise be substantially burdened**

Likewise, the litigants in any similar pending matters in circuit courts all over Michigan also have a reliance interest in the continued vitality of the existence of subject matter jurisdiction in those courts, because a decision overruling *Sewell* would cast them all back to square one and would require all of them to share a huge backlog of cases being re-filed in the WCA. The litigants have already incurred substantial litigation expenses based on the existence of jurisdiction, and to require them all to start from scratch and relitigate issues that have already been partially or fully decided would without doubt constitute an undue economic hardship on all of their parts.

f. Summary and conclusion – *Robinson* factor 4.

The *Sewell* decision has become embedded in this state's jurisprudence. Because it affects subject matter jurisdiction which arises from the Michigan Constitution, it is fundamental, and any decision that subject matter does not exist would have far-reaching legal and practical consequences, including voiding a substantial number of decisions in cases that are pending or were already decided long ago. These consequences are so serious that they substantially burden the reliance interests of a large number of litigants, creating undue hardship. The practical real-world dislocations that would result are unacceptable to the jurisprudence of this state, and especially so because it is simply unnecessary to overrule *Sewell* to address the prudential concerns outlined by

those concerned about *Sewell's* rule of decision. For all these reasons, the fourth *Robinson* factor militates strongly against overruling *Sewell.*

5. <u>There Has Been No Subsequent Change in the Law Justifying a New Order</u>

The fifth factor is easily dispensed with. The statute at issue, MCL 418.841(1) has not changed in any relevant way since *Sewell* was decided. It currently reads as follows:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable. The director may be an interested party in all worker's compensation cases in questions of law.

According to the MCLA's "Historical and Statutory Notes" following this statute, the language on which the argument for overruling *Sewell* is based (the "all questions arising under this act" language) has not been changed since *Sewell* was decided:

> The 1985 amendment, inserted the subsection numbering; in subsec. (1), in the first sentence, inserted "dispute or" and "or other benefits", and added "or a worker's compensation magistrate, as applicable", and in the second sentence, substituted "may" for "shall be deemed to" and "worker's" for "workmen's"; and added subsecs. (2) to (10).[6]
>
> The 1994 amendment, in subsecs. (4) and (6), deleted "or hearing referee, as applicable," following "magistrate" throughout; in subsec. (8), substituted "magistrate, or" for "magistrate or hearing referee, as applicable, or"; and, in subsecs. (9) and (10), deleted "or hearing referee's" following "magistrate's" throughout.

Since there has been no change in the relevant statutory language (or, for that matter in the constitutional provision granting plenary jurisdiction to the circuit courts), the fifth *Robinson* factor also militates against overruling *Sewell.*

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[6] No argument has been made that the new subsections, which relate solely to small claims in the WCA, have any bearing on this matter; instead, the argument for overruling *Sewell* is based solely upon subsection 1.

6. The *Robinson* Factors, Considered in Concert, Overwhelmingly Favor Allowing *Sewell* to Stand.

The *Robinson* factors all advocate in favor of allowing *Sewell* to stand. First, and dispositively, the decision was correct. Correct decisions should never be overruled. Second, the decision, far from being unworkable, works beautifully and the courts have had no complaint about how it operates. Concurrent jurisdiction allows, but does not require, either the WCA or the courts to render a decision when a case straddles the borderline of tort and worker's compensation law. Third, the decision properly accords respect to the constitutional provisions granting plenary jurisdiction to circuit courts. Fourth, *Sewell* is firmly embedded in our state's jurisprudence and it addresses such a fundamental concept that overruling it would unnecessarily produce substantial practical real-world dislocations, including effects on longstanding legal precedent, problems that affect many other cases, rendering void any decision made by the circuit court in this arena, affecting the reliance interests of the litigants in the current, as well as all other pending litigation in circuit courts involving the borderland of tort and the WDCA, not to mention numerous cases already decided. Fifth, there has been no change in the statute which would justify a change in the previous law.

Accordingly, there is no basis under the *Robinson* analysis to overrule *Sewell*, and this Court should adhere to its previous decision and allow *Sewell* to stand.

B. The Practical Consequences of Overruling *Sewell* are Substantial, Deleterious, and Unnecessary

This Court's order directing the parties to file supplemental briefs required the parties to address, in addition to the *Robinson* factors discussed above, "the likely practical consequences that would result if this Court were to overrule *Sewell.*"

1. Defendant-Appellee Adopts by Reference the Cogent Discussion of Practical Consequences in the Brief of *Amicus Curiae* Michigan Defense Trial Counsel

Many practical real-world dislocations are cogently described in the Supplemental Brief on Appeal filed by *amicus curiae* Michigan Defense Trial Counsel, Inc., and Defendant-Appellee, deferring to that party's expertise with respect to matters of general worker's compensation law, fully concurs in those arguments and explanations of practical consequences and adopts them herein by reference. These include the problem of how a case would get from the court to the agency, since the court is not permitted to issue any orders, the need for setting up a procedure that does not now exist in order to effect such transfers, the delay of the case involving other co-litigants that results from the requirement of pursuing an agency determination, and many more. *See id.* at pp. 7-16.

2. The Circuit Court Cannot Hold a Matter in Abeyance Pending a Decision By The Agency

Another of the practical effects has already been alluded to – that is, a circuit court would be entirely unable to hold a matter in abeyance while a worker's compensation issue was resolved. All of the *amici* rely upon this proposed procedural device to support their arguments that there will not be any real-world problems caused by overruling *Sewell.* They argue that given the existence of this device, litigants can file either place but the WCA will always make the decision about the applicability of the WDCA. They suggest that the circuit courts will simply hold the cases in abeyance while the WCA makes its determination. This supposition is in error, however, because, as noted above, a court has no power to make any order other than one to dismiss a case if it lacks subject matter jurisdiction. *Fox, supra, Bowie, supra.* Accordingly, since this is the only safety net the *amici* can propose to avoid real-world dislocations, those dislocations are inevitable if *Sewell* is overruled.

If this Court overrules *Sewell* by ruling that circuit courts do not have jurisdiction to determine their own jurisdiction, a circuit court would be required to immediately dismiss any case in which the possible applicability of the WDCA is raised, and would not be permitted to evaluate the merits of such a claim. In practice, then, any responsive pleading raising the WDCA as an affirmative defense would be accompanied by a request for an order to dismiss, a request that the circuit court would have no power to deny.

3. Claimants Would Be Forced to Bring All Claims in the WCA Even If They State Only Tort Claims, Creating Substantial Statute of Limitations Problems

Thus, unless the Court also crafts an entire new set of procedural rules, the like of which has never existed before, a claimant would in essence be forced to bring her claim in the Worker's Compensation Agency regardless of a belief that her case sounds in tort, if she can anticipate any possibility that any defendant might raise a defense based on the WDCA. In so doing, the claimant would open herself up to the very real possibility that she will fall afoul of the statute of limitations.

Since the circuit court cannot issue a stay or hold the matter in abeyance, even if there were finally a determination (which might occur only after appeals to the WCAC and the Court of Appeals were concluded) that there was no cognizable worker's compensation claim, and that the claimant's remedy was properly in the circuit court, the applicable statute of limitations would likely have passed by the time that determination is made.

Unless some special dispensation is granted, which has not formerly existed, the case could not be considered to have been filed in the court at the time it was filed in the agency, since the agency has no power to change the effect of statutes of limitations which have nothing to do with the WDCA. Nor, if the plaintiff had filed in circuit court only to have her claim summarily dismissed, would the case be considered to have been filed then, because it could not be dismissed with any retention of jurisdiction.

Accordingly, claimants whose claims arguably, but ultimately are ruled not to, arise under the WDCA, are caught in a Catch-22 situation where they simply cannot assure themselves of being able timely to file in circuit court since they will be forced into the WCA first.

4. **Other Consequences Are Likely, But Unpredictable**

Drastic changes in the law often have far-reaching consequences that the parties cannot anticipate. Defendant-Appellee believes that a change in the law of the magnitude involved in overruling *Sewell* is likely to cause untoward consequences. For these reasons, and because there is no necessity to overrule *Sewell,* this Court should avoid that tar pit by simply leaving the decision alone.

IV. RELIEF REQUESTED

Defendant-Appellee requests that this Court affirm that the circuit court and the Court of Appeals had jurisdiction to determine the question of whether Plaintiff was an employee within the meaning of the WDCA.

Dated: June 21, 2006

COOPER, MARTIN & CHOJNOWSKI, P.C.
Attorneys for Defendant

By: _____
John N. Cooper, II (P27678)

COOPER, MARTIN & CHOJNOWSKI, P.C.
Attorneys for Defendant

By: _____
Margot M. Poznanski (47786)

CERTIFICATE OF SERVICE

Marilyn S. Merrill states that on the 22nd day of June, 2006, two copies each of Defendant-Appellee's Supplemental Brief Submitted in Accordance with the Court's Order Dated May 12, 2006 were served on:

Thomas J. Wuori (P41096)
Halpert, Weston, Wuori & Sawusch, P.C.
Counsel for Plaintiff-Appellant
136 E. Michigan Ave., Suite 1050
Kalamazoo, MI 49007

Hal O. Carroll (P11668)
Vanderveer Garzia, P.C.
Counsel for Amicus Curiae
Michigan Defense Trial Counsel, Inc.
1450 W. Long Lake Rd., Suite 100
Troy, MI 48098

Martin L. Critchell (P26310)
Counsel for Amicus Curiae
Workers' Compensation Law Section of
The State Bar of Michigan
30700 Telegraph Road, Suite 2580
Bingham Farms, MI 48025

Thomas L. Casey (P24215)
Rose A. Houk (P15156)
Victoria A. Keating (P36890)
Counsel for Intervenor-Appellant, Director
of the Workers' Compensation Agency
Cadillac Place
3030 West Grand Blvd., Suite 10-161
Detroit, MI 48202

Steven A. Hicks (P49966)
Sinas, Dramis, Brake, Boughton
& McIntyre, P.C.
Counsel for Amicus Curiae Michigan
Trial Lawyers Association
3380 Pine Tree Road
Lansing, MI 48911-4207

Lori L. Tobis (P37014)
Counsel for Intervenor-Appellant Michigan
Mutual Insurance Company
26777 Halsted Road
P.O. Box 2060
Farmington Hills, MI 48333-2060

By first class mail, placing the same in a United States mail receptacle in Kalamazoo, Michigan with postage duly paid.

Marilyn S. Merrill

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